United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1204

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 74-1204

B

P/S

COALITION FOR EDUCATION IN DISTRICT ONE, BERTRAM BECK, PEDRO CORDERO, FRANK SUAREZ, JANE TAM, ERIC SNYDER, LYLE BROWN, GEORGINA HOGGARD, HENRY RAMOS, RAMONA CALDERON, FELICITA CLAUDIO, AMELIA OPIO, GLORIA ORTIZ, BERNARDO RODRIGUEZ, DONATO VELEZ RIVERA, PETRA SANTIAGO, JUANITA RIVIERA, RAMON PELIER, et al.,

Plaintiffs-Appellees,

v.

THE BOARD OF ELECTIONS OF CITY OF NEW YORK, GUMERSINDO MARTINEZ, ALICE SACHS, ELRICH A. EASTMAN, HERBERT J. FEUER, CHARLES AVARELLO, ELIZABETH CASSIDY, ANTHONY SADOWSKI, et al.,

Defendants,

CAROLYN KOZLOWSKY,

Defendant-Appellant.

ON APPEAL FROM THE ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT CAROLYN KOZLOWSKY

3-19

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STATEMENT OF THE ISSUE PRESENTED

Whether the appellees' rights under the Voting Rights Act of 1965, as amended (42 U.S.C. 1973 et seq.) and the Fourteenth and Fifteenth Amendments of the United States Constitution were so violated in the conduct of an election for school board members as to warrant the District Court to invalidate and set aside the election, declare the positions on the school board vacant, order a new or special election, and pending such new or special election to appoint and designate a third party to exercise the statutory and administrative powers of the removed school board.

STATEMENT OF THE CASE

In early October, 1973, appellees commenced this civil action in the United States District Court for the Southern District of New York for a declaration that by reason of alleged racial discrimination in the conduct of an election for school board membership to the New York City Community School Board District 1 (hereinafter referred to as "District 1 Board") held on May 1, 1973 under the supervision, direction, and control of the New York City Board of Elections that said election should be invalidated and set aside.

Again, in early October, 1973, appellees obtained an order to show cause with a temporary restraining order which was extended and re-extended from time to time and continued in effect during the entire period of the litigation below, seeking a preliminary injunction to enjoin the District 1 Board from firing certain employees [A-44,101,116].* The District Court held evidentiary hearings on this application for a temporary injunction [T1-790]** during the period from October 15, 1973 to October 30, 1973 and it was stipulated and agreed among all interested counsel at the conclusion of those hearings, with the approval of the District Court, that the evidence adduced at those hearings comprise the trial record for a decision of the case on the merits by the District Court (T-785).

On January 11, 1974, a lengthy written opinion containing the findings of fact, conclusions of law, and its order was rendered by the District Court [A153-193].

By its order dated the 5th day of March, 1974, this Court granted a motion for a preference and that the appeal be heard on typewritten briefs.

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* "A" - References are to separate joint appendix

** "T" - References are to separate transcripts of hearing minutes.

THE BACKGROUND

New York State Education Law, Article 52-A (Section 2590 et seq.), which is generally referred to as the "School Decentralization Act", provided for the creation and establishment of independent public school districts in the City of New York. Thirty two (32) such school districts were established (A-644, 635), each to be administered by a separate local school board elected by its community. District 1 Board was established and organized to administer the public schools in the area of the City of New York known as the Lower East Side of the Borough of Manhattan.

The school board in each district consists of nine (9) members and the details concerning election of school board members are set forth in Education Law Section 2590-c, which provides, in essence, as follows:

1. The school board shall be elected for a two (2) year term and serve without compensation (2590-c1).

2. School board members shall be elected at an election conducted by the Board of Elections in the City of New York on the first Tuesday in May in each odd numbered year for a term commencing on July 1 next following (2590-c2).

3. Eligible voters (2590-c3)
   a) Every registered voter residing in the school district; and

b) Every parent of a child attending a school in such district who is a citizen of the state, a resident of New York City for at least 30 days, and at least 18 years of age.

4. A registered voter shall vote at a polling place in his community district designated by the Board of Elections. A parent voter shall vote at a polling place in his community district designated by the Board of Education. Polls shall be open from 6 A.M. to 9 P.M. (2590-c5). No person may vote more than once in more than one community district (2590-c3).

5. Members shall be elected by proportional representation (2590-c6), and the specific manner of casting ballots, counting ballots, declaring a candidate elected are set forth in the aforesaid subdivision.

By reason of the foregoing, it may readily be seen that a school board election differs considerably from a general election in that, in addition to the regular registered voters, it makes eligible as voters students' parents who would not be eligible to vote in a general election, and provides for the counting of ballots on a proportional representation method. The combination of the creation of the parent voter category and the proportional representation count had and has its goal the guarantee of representation to minority groups (T-641); this cannot be denied.

The first election of school board members was held in 1970 (T-639) and the originally elected majority of the District 1 Board were those who were opposed by the appellees herein.

From the time of their election, the majority of the original District 1 Board were under attack by these appellees and their supporters (T356-357) with resulting resignations, deadlocked board, and litigation which ultimately reached the New York State Court of Appeals in two cases - Mercado v. Scribner, 30 N.Y. 2d 811 and Roher v. Dinkins, 32 N.Y. 2d 841 (1973) - both relating to the composition and legality of the District 1 Board. The said District 1 Board, at the end of the term, prior to the election which is the subject of this litigation, had so changed by reason of the filling of six vacancies created by resignations or ousters, that there remained only one member of the originally elected majority when the term of the original school board ended.

In light of the foregoing history, on May 1, 1973 the election date for all school board members for all community districts in New York City, it was recognized and known by all in the District 1 community that the forthcoming election would be a hotly contested one and that two factions existed in that community - the appellees and their adherents who were then in control of the District 1 Board and a group aligned with the originally, first elected board.

Prior to the May 1, 1973 election, seeking pre-election relief, those allied with the appellees, including some of the appellees, sought and obtained an order from the United States District Court for the Southern District of New York (Lopez v. Dinkins 73 Civ. 695) an order dated March 21, 1973 requiring the Board of Elections and Board of Education for the May 1, 1973 election to, in essence, prepare ballots, distribute sample ballots, prepare and distribute instruction sheets - all in Spanish, English; provide at each school polling site where more than 5% Puerto Rican or more than 5% Chinese pupils enrolled, a proper bi-lingual interpreter and to inform the Spanish speaking and Chinese speaking voters of the bi-lingual assistance available at the election (A155-156). No other pre-election relief was sought or obtained by appellees.

The method of determining the eligibility of a voter to vote in the May 1, 1973 school board election throughout each school district in New York City was altered or changed as a result of a last minute State court decision and a remedial statute enacted immediately thereafter.

In all prior elections, a card known as a "buff card" which contains the signature of the voter is present at the polling place and the eligible voter signs his name on this

card to cast his ballot. The voter is thus identifiable by his signature. However, because of an impending primary in a general election, the Board of Elections found that it could not make the buff cards for registered voters available at the polling places for the school board elections, and ordered that instead of the buff cards for registered voters that it would have the applicable computer print-out list of registered voters at each polling place for the May 1, 1973 election and use such computer list to determine the eligible registered voters. Such proposed procedure was attacked as being invalid, and on April 27, 1973, the New York State Court of Appeals held in Raimundi v. Board of Elections, 32 N.Y. 2d 768,344 N.Y.S. 2d 957 that the buff card must be used in the school board elections. Immediately thereupon, a statute was enacted, Laws of New York Ch. 236, adopted and on April 30, 1973, authorizing and empowering the Board of Elections to use the computer print-outs as planned.

Accordingly, at the May 1, 1973 school board elections, present at the polling places were computer print-out lists for the eligible registered voters, and buff cards for the eligible parent voters.

The District Court has invalidated and set aside an election conducted in New York City by the New York City Board of Elections on the ground of racial discrimination (A-193).

The court may take judicial notice that one David N. Dinkins, a black man, was President of said Board of Elections. In addition, the special unit of the Board of Elections for this school board election was under the direction of Paul Greenberg who was a special assistant to the late Dr. Martin Luther King as his electoral expert for the state of Alabama, among other things (T-678). The District Court order is unprecedented in New York City. The appellant, Carolyn Kozlowsky, is one of the elected members of the school board whose election was invalidated; no allegation or finding attributes racial discrimination to this appellant. The alleged racial discrimination found by the District Court was the result of the action and non-action of the Board of Elections and Board of Education in the conduct of the election.

A review of the voter registration steps and other pre-election efforts taken by the Board of Education and Board of Elections to assure the largest possible voter turn-out, particularly by racial and ethnic minority voters and to familiarize and instruct that group on the actual voting method, clearly negates any racial discrimination. Thus, the registration period was extended (T-52), deputy registrars were appointed at schools with whom parent voters could register (T-649), sample ballots were printed with instructions in the English and Spanish languages (A281-282)., petitions for candidates

were printed and distributed by the Board of Elections - these are usually drawn and printed by the candidate himself - in three (3) languages (T-646), and public and widespread publicity of the election was disseminated by the Board of Elections in all media including foreign language press and radio stations (T-647), and bi-lingual interpreters in Spanish - English and Chinese - English were assigned to polling places on election day where 5% or more of the registered voters speaking that language were to vote (Lopez order).

The effect of the pre-election registration effort was that almost 25% of the newly registered voters in the entire city were in District 1, which is only one of 32 school districts (T-99). Thus, there never was a charge in the instant action that any of the registration procedures were discriminatory (T-63) and that every pre-election effort was made to inform the public of the election.

Although the school population in District 1 is 93% non-white (T-62), and 73% are Puerto Rican (T-31), the resident population of District 1 is broken down to a 58.6% white and 41.4% non-white (A-164 T-250). Since the District 1 electorate consists of both the registered voters and parent voters in the district, the non-white voters are in a minority. When there is added to this fact that, as admitted by the appellees, the non-

whites do not exercise their right to vote as diligently as do the whites - in 1972 election 35% of Puerto Ricans, less than 50% of black, and 64% of white registered voters voted (T-41), the whites are the obvious majority of this electorate.

The balloting in the instant election was by proportional representation. The purpose of so counting votes is to guarantee a minority representation. Three (3) candidates supported by the appellees in the election which was invalidated by the District Court were elected and each was either black or Puerto Rican (A-151); the appellant group elected six (6) of its candidates, including one black (A-151). Thus, the elected school board in the May 1,1973 election, on the basis of district population, bore a true and accurate ratio to the ethnic background of the district.

Of all of the 32 school districts which held elections on May 1, 1973, District 1 had the second largest percentage vote cast in the entire city (T-651,A-269) when 22.45% of the eligible voters voted. The registration was 58,923 voters and 13,230 voted (T-651,A-269). In the prior school board election in this district held in 1970, 6,355 voted out of 42,428 eligible voters (T-669). The number of blank ballots and invalid ballots in District 1 together was 4.70% of the vote cast(A-269), which was below the Manhattan average of 5.00% (T-643). In the remaining five districts in Manhattan, the percentages of eligible voters who voted in the school board elections were only-6.32% 5.06%, 9.07%, 8.57% and 11.10% (A-268).

For voting purposes in the instant school board election, there were 72 election districts (T-581) which were the same as were used in regular elections (T-91) and which were located in 33 polling places (A-253) that have been used for years (T-74), except for a polling place at Emanuel Presbyterian Church (T-769). Between the period of ten days to one week before the election, the Board of Elections mailed 3,500,000 notices - one to each eligible voter in the school board election-informing each voter of the location of his polling place (T-671-673). The evidence adduced at the trial by appellees related to only 14 polling places; no evidence was offered by appellees as to any alleged discrimination at the remaining 19 polling places.

Joseph Fristachi, Executive Assistant to the Attorney General of the State of New York (T-592), who was in charge of special task force supervising the elections in District 1, spent all of election day in District 1 (T-593), until the polls closed (T-595), touring the district polling places (T-597). He found no problems in 90% per cent of the district (T-595,597) and less people were denied the right to vote in the school board election than in a regular election (618).

Mr. Fristachi had experience in many elections during his 4-1/2 year term as an assistant attorney general and executive assistant attorney general and in election cases (T-615). At the conclusion of the election, Mr. Fristachi reported to the Attorney-General that there were complaints, that there were not any overall problems, and it went smoothly (T-625). There were 17 complaint forms received by the Attorney-General (T-621); the complaints were generally the same.

The special unit in the Board of Elections which conducted the election received complaints from all of the 32 school districts in the city which complaints were no different from those testified to by appellees' witnesses as occurring in District 1 (T-653-654).

On May 8, 1973 - one week after the election - at a meeting called by the appellees relative to the irregularities in the election of May 1, 1973, four hundred (400) interested district residents attended the meeting which was held from 2:00 P.M. to 5:00 P.M. and from 7:00 P.M. to 10:00 P.M. at a public school in the district. At such meeting 60 persons gave public testimony and approximately 200 gave written statements of irregularities in the conduct of the election (T-103). Although armed with this information and data, appellees waited a period of approximately five months - until early October, 1973 - before instituting the within action.

The evidence with respect to the matters of alleged racial discrimination adduced at the trial and as found by the District Court are dealt with in Point II of the Argument when the specific findings in the District Court opinion (A-153-193) are recited and analyzed.

SUMMARY OF ARGUMENT

A State Election of members of a school board was voided on the ground of racial discrimination in the conduct thereof. The school district involved was one of 32 districts in the City of New York and a district in which the second highest percentage of registered voters voted, where the composition of the elected school board was reflective of the composition of the eligible voters. Proportional representation voting was utilized in this election to insure minority representation and this goal was attained in this election. Extraordinary measures were utilized in voter registration campaigns prior to the election and to insure the widest possible participation in the election by the electorate. No evil motive or intentional discrimination was found in the conduct of this election.

The action to void the election was commenced approximately five months after the election. Certain irregularities claimed were known to have existed prior to the election and though the complaining parties sought, and obtained pre-election relief which was fully complied with, no pre-election relief was sought with respect to the alleged irregularities claimed in this action. Thus, the requisite pre-election and post-election diligence required to set aside an election were not established.

There were irregularities in the election, but, by and large, these were the irregularities that occur in any election - to wit: late opening of polls, misdirected voting materials, unfound names of voters, and inexperienced inspectors. These irregularities occurred in all districts and were not racially discriminatory. If, as the District Court found, the totality of all of these irregularities added up to and had the impact of racial discrimination, the level of discrimination found was not of the magnitude necessary to set aside a completed election. The Voting Rights Act of 1965 was not intended to deal with irregularities in State elections. If only irregularities are shown, in order to hold same as racially discriminatory, it must in addition be established that the irregularities were the result of racially discriminatory intent or motive. The District Court specifically found that there was no evil motive or intentional discrimination in the instant case.

On October 9, 1973, the District Court granted a temporary restraining order staying the District 1 Board from discharging certain employees. This restraining order was continued and expanded and was in effect until January 11, 1974, when the decision and order on the merits was made by the District Court voiding the election, removing the elected school board from office and ordering the Chancellor to fulfill the statutory and administrative powers of the school board, pending the holding

of a special election which was also ordered.

The District Court found that there were chaotic and explosive conditions in District 1 and it was for that reason it felt it necessary to issue the temporary restraining orders, continue them throughout the litigation and remove the board when it voided the election, instead of voiding the election, declaring the office vacant and permitting the elected at the special election ordered.

Such action in immediately removing the school board was by the District Court, in effect, a surrender to a dissident minority represented by appellees and their supporters, since the chaotic, explosive conditions which were rightfully the concern of the District Court, were the outgrowth of the actions and activities of the minority.

Assuming the District Court's determination in invalidating the election was proper, the proper course should have been to declare the offices of the elected board members vacant, while permitting them to serve and discharge their duties until their successors were elected. Such procedure after the voiding of a completed election has been followed in most cases and is the accepted practice under New York State Law for State officers. It was an abuse of discretion for the District Court to have appointed a third party, albeit the Chancellor of the New York City Board of Education, to administer this school district.

A R G U M E N T

POINT I

TO INVALIDATE A COMPLETED ELECTION, THE PARTIES SEEKING SUCH RELIEF UNDER THE VOTING RIGHTS LAW OF 1965 MUST EXERCISE BOTH PRE-ELECTION DILIGENCE TO PREVENT KNOWN POSSIBLE DISCRIMINATORY PRACTICES AND POST-ELECTION DILIGENCE IN CHALLENGING THE COMPLETED ELECTION. APPELLEES FAILED IN BOTH RESPECTS AND SHOULD BE DENIED ANY RELIEF.

It is well established that the plaintiff must diligently seek both pre-election and post-election judicial relief to invoke the Voting Rights Law of 1965 to set aside a completed election. McGill v. Ryals (M.D. Ala. 1966) 253F. Supp. 374 appeal dism'd, 385 U.S. 19, 87 S. Ct. 212 17 L.Ed 2d 17; Hamer v. Campbell (5 Cir., 1966), 358 F.2d 215; Bell v. Southwell (5 Cir., 1967) 376 F.2d 659; Smith v. Paris (M.D. Ala. 1966), 257 F. Supp 901; Toney v. White (5 Cir. 1973), 476 F.2d 203; Toney v. White (En Banc 5 Cir. 1973) 488 F.2d 310.

In McGill v. Ryals, the court recognized "that the community has a substantial interest in stable elections and prompt determination of their validity" 253 F. Supp. 376. The Court's statement in McGill is a recent affirmation of the Court's long established position that the right to vote is one of the most fundamental rights of a free society and

representative government; it is preservative of all government rights (Yick Wo v. Hopkins 1886, 118 U.S. 356, 370, 30L.Ed. 220, 226, also see Harman v. Forssenius 1965, 380 U.S. 528, 537 85 S. Ct. 1177, 14 L. Ed. 2d 50, 57).

Thus, the Court in McGill held that the absence of showing due diligence in seeking pre and post election relief of long standing complaints precluded the plaintiffs from being granted the relief requested. In Smith v. Paris, supra, racial discrimination was found but the Court refused to set aside the election because the plaintiffs had knowledge of the discrimination six or seven weeks prior to the election and took no action until the election was in progress.

The District Court found the pre-election diligence of the plaintiffs unassailable (T-189); predicating its findings of unassailability upon the fact that some of the plaintiffs in this case brought actions prior to the election to assure certain rights. In Lopez v. Dinkins 73 Civ. 695 (S.D.N.Y.1973), plaintiffs sought to secure the right to a multi-lingual election. The defendant, Board of Education and Board of Elections, stipulated to the conduct of a multi-lingual election (T-155). Lopez resulted in an order (referred to frequently as the Lopez order) which established assistance to non-English speaking

voters i.e. bi-lingual interpreters, bi-lingual ballots and instructions to voters, etc. The District Court found "...that the Board of Elections took steps which went beyond those compelled by the Lopez order in some respects in an attempt to allow full minority participation in the May 1 election" (T-167). The Court also referred to the actions brought by the appellees in the State Courts concerning the use of "buff cards" and the identification of voters. (T-160). The three cases cited above comprise the totality of appellees' "unassailable diligence".

However, the District Court's findings of racial discrimination requiring a new election was based principally upon factors separate and distinct from the issues raised in Lopez and the two State Court cases.

The findings of the District Court, the elements of which constitute racial discrimination, can be categorized as those which were known to the appellees before the elections and those which first became known during and after the election.

The changes in election districts, polling places and the placement of certain polling places were found by the Court below to be detrimental to minority voters (T-178,179). Appellees, though, experienced and able Counsel sought pre-trial relief from the Court below in January, 1973, at least

three months before the election on May 1, 1973. The relief they sought was granted in the Lopez order.

Local Law 4, 1973 was enacted by the New York City Council and became law on January 18, 1973. As a result, there was a change in election districts in District 1 and, although polling places remained the same except for one addition, certain election districts were moved from one polling place to another. This was or should have been known to appellees' counsel at the time of the Lopez application. No request for any relief was sought with respect to the location of the polling places or election districts when pre-election relief resulting in the Lopez order was sought.

The facts concerning locations of polling places and election districts did not change between January and May, 1973. We submit that appellees' failure to raise these questions prior to the election demonstrates lack of requisite pre-election diligence, and as a result, the District Court should not have considered location of polling places or change of election districts as elements in reaching his ultimate finding of racial discrimination.

A second category of the District Court's findings concern those allegedly discriminatory acts which first became known to the appellees during the election, or shortly thereafter.

On May 8, 1973, one week after the election, all the allegedly discriminatory acts complained of were known to the appellees the appellees (T-103). Appellees first commenced this action in October, 1973, five months after the election.

The cases that deal with post-election relief set a more stringent standard then that required for pre-election relief. In Bell v. Southwell, supra, the appellees were diligent where the action was commenced a few days after the results of the election were made known. In McGill v. Ryals, relief was denied where no relief was sought prior to the election or a reasonable time thereafter. In Hamer v. Campbell, supra, the appellees were diligent where they commenced their action on April 23, 1965 prior to primaries scheduled for May 11 and 18, and the election on June 8. The District Court denied relief prior to the election and the action commenced in April continued on appeal during and subsequent to the election of June 8.

In Toney v. White supra, the court was confronted with the question of pre-election diligence where record was not clear whether the appellees knew of the discriminatory purge

of voters prior to the election. The Fifth Circuit granted the appellees the benefit of the doubt and treated the appellees' knowledge as arising at the time of the election; as to post-election diligence it held that since the action was commenced thirty days after the election the appellees were diligent.

The appellees herein did not respond diligently. The cited cases clearly demonstrate that a five month delay would not be permitted. The appellees took no action until they were convinced that the newly elected school board could not be subverted or intimidated and would independently exercise its statutory powers in District 1. It was only when the Board attempted to lawfully discharge three employees of the District and presented charges against the Superintendent of the District that this action was commenced and an order to show cause and temporary restraining order dated October 9, 1973 obtained (A-43).

We submit that the Voting Rights Act of 1965 was not and is not a tool to be used by defeated candidates to overcome the results of an election.

Pre and post election diligence are not mere technical and inconsequential barriers to the granting of relief where violation of the Voting Rights Law and U.S. Constitution are alleged. The requirement of diligence is intended to discourage parties who raise a claim "to lay by and gamble upon receiving a favorable decision of the electorate" and then upon losing, seek to undo the valid results in a court action. (Toney v. White 476 2d. 203,209 aff'd. by en banc, supra).

POINT II

THE RECORD DOES NOT SUPPORT THE DISTRICT COURT'S CONCLUSION THAT THE RIGHTS OF APPELLEES PROTECTED UNDER THE VOTING RIGHTS ACT OF 1965 AND THE FOURTEENTH AND FIFTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED IN THE CONDUCT OF THE ELECTION HEREIN AND THE DISTRICT COURT ERRED IN SO CONCLUDING.

The Voting Rights Act of 1965, as amended, prohibits any practice or procedure which either by design or effect operates to deny or impair the right to vote in any election, federal or state, solely because of an otherwise qualified elector's "race, color or previous condition of servitude" (42 U.S.C.A. Sec. 1971, et seq.). Similarly, the Equal Protection clause of the Fourteenth Amendment and the Fifteenth Amendment to the United States Constitution prohibit ethnic or racial discrimination in the electoral process.

The District Court herein has set aside a completed election on the ground of alleged racial discrimination in the conduct thereof. The leading and compelling authority on the voiding of a completed election is Bell v. Southwell, 376 F.2d 659, (5th Cir. 1967).

Although no pre-election relief was sought in Bell, it

is nevertheless applicable in the instant appeal where pre-election relief was sought, granted, and fully complied with (A-167). No logical distinction can be drawn between the cases on such grounds.

Bell established that setting aside a completed election on the ground of discrimination required that the discrimination complained of must be "gross", "spectacular", "completely indefensible", "obvious", "state imposed", and "state enforced" [p.664]. Even upon finding of such discrimination, the Court recognized that

> "Drastic, if not staggering as is the Federal voiding of a State election and therefore a form of relief to be guardedly exercised..."

and that

> "...not every unconstitutional racial discrimination necessarily permits or requires a retrospective voiding of an election....."

In Bell, because of the nature of the traditional discrimination in the area of Sumter County, Georgia, in which this case arose and the continued, unchanged practice of segregated voting lists and polling places for white males, white females, and a third place for negroes, the Court felt compelled to set aside the election.

Perkins v. Matthews, 336 F. Supp 6 (D.C., So. Dist. Miss. 1971), a three-judge court citing Bell stated:

"We vote, of course, that to require a new election.....would be an unusual, if not harsh, remedy. The setting aside of a completed election is normally required only upon a finding by the court that gross and indefensible racially discriminatory practices were employed in the election (p.9)".

In Hubbard v. Ammerman, 5th Cir. 1969, 465 F.2d 1169, 1177, the court interpreting its own holding in Bell said:

"We read the remedy in Bell as designed to match the enormity of the deprivations involved....."

In Hamer v. Ely, 5th Cir. 1969, 410 F.2d 152,156, the court in referring to the setting aside of an election said:

"Such drastic measures are properly reserved for cases involving serious violations of voting rights." (citing cases)

In Gray v. Main, M.D. Ala. 1968, 309 F. Supp 207,222 when reviewing the actions of election officials at the polls stated:

"...before such officials are unduly criticized or their acts labeled improper, it should be clear that their acts were unduly harsh, illegal or arbitrary...."

The foregoing cases concern the nature of racial discrimination to set aside an election under the Voting Rights Act of 1965, where no pre-election relief was sought.

Hamer v. Campbell, 358 F.2d 215 5th Cir., 1966 and Hadnot v. Amos, 394 U.S. 358, 89 S. Ct. 1101 (1969) are cases where pre-election relief was sought and improperly denied. In these cases it has been held that there need be no showing of "gross and spectacular discrimination" as in Bell. Still, Hamer held:

> "This action (the setting aside of an election) does not mean we necessarily would set aside every election in which a substantial number of citizens were denied the right to vote".

Another line of cases involves the equal protection clause of the Fourteenth Amendment. Two such cases are Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) and Powell v. Power, 436 F.2d 84 (2d Cir. 1970). In Harper, the Virginia Poll Tax was held discriminatory as between rich and poor. Wealth was held "to introduce a capricious and irrelevant factor" as a qualification to voting and thus a denial of equal protection. Harper was not decided on the ground of racial discrimination. In Powell v. Power, this court held that in order to invoke the equal protection clause of the Fourteenth Amendment the discrimination claimed must be intentional and purposeful. See also, Gomillion v. Lightfoot,

364 U.S. 339 (1960), finding that the gerrymandering of Tuskegee was purposeful discrimination in violation of the Fifteenth Amendment.

The District Court in the instant appeal, determined that the totality of the irregularities herein reached a level of serious violations of the Fourteenth and Fifteenth Amendments and the Voting Rights Law to warrant the voiding and setting aside of the election herein. However, the Court specifically found that those violations were not "gross, spectacular and wholly indefensible" (A-188) as required by Bell, and not having made such finding, the District Court improperly set aside the election.

In reaching its determination to void the election herein, the District Court relied essentially upon the authority of Harper v. Virginia Board of Elections, supra., Gomillion v. Lightfoot, supra., Toney v. White, 348 F. supp 188 (W.D. La. 1972), Toney v. White, 488 F.2d 310, and U.S. v. Post 297 F. Supp. 46 (W.D. La. 1969) (A-185).

Gomillion, is not applicable herein since it dealt with purposeful discrimination (supra.). Harper, is not pertinent since it did not concern racial discrimination but the payment

of a fee as an unreasonable qualification for voting. Toney v. White,476 F. 2d 203, the circuit court specifically stated that if U.S. v. Post had reached their court on appeal it would have reversed the District Court.

Thus, we are now left with Toney, (en banc) supra, and the Fifth Circuit decision therein. Toney, is a hybrid case by the Circuit Court's own admission. The basic facts therein were that the voter Registrar improperly purged the negro voter list, without purging the white voter list. The District Court found that this failure was innocent and no appeal was taken from that finding. The Fifth Circuit specifically avoided the issue whether the action of the Registrar was innocent or intentional.

It is the appellant's contention that Toney is not applicable to the instant appeal because Toney is basically and fundamentally a case in which there was disobedience by the voter Registrar of a permanent and specific injunction not to discriminate against voters (note 3) which the facts in the opinion show was violated by the voter Registrar. A violation of an injuctive order does not require the showing that the racial discrimination was purposeful or intentional for relief to be granted. However, the District Court having greatly relied on the authority of Toney in reaching its decision to void the election, an examination of the Toney decision is warranted.

The standard set by Toney in order to set aside an

election where no gross and flagrant discrimination was found, and no pre election relief had been sought is as follows:

1) diligence in seeking relief
2) substantial racial discrimination
3) the outcome of the election could have been affected.

In the instant case the appellees failed to meet these three standards in all respects.

The failure of the appellees to meet the requirement of diligence is discussed in POINT I, of this brief.

As to substantial racial discrimination the District Court found:

1.There is no evidence that the Board of Education or the Board of Elections intentionally discriminated against minority voters in the May 1, District One election (A-181).

2. Unlike Bell, this case is not one where the discrimination was the result of the defendants evil motive or where it was " gross, spectacular and wholly indefensible" (A-188). Based on the foregoing findings and the applicable law in Bell the District Court erred in voiding a State election.

How, then, did the District Court attempt to justify its determination that the election be set aside? The opinion of the District Court sets forth various alleged irregularities and alleged acts of discrimination, the totality of which had a racial discriminatory impact (A-168). These matter were:

A. The absence or late arrival of election materials or inspectors at polling places serving minority voters (A169-170).

The problems of late delivery of materials to the polling places, misdirected materials, inspectors delayed arrival or failure to arrive are common incidents attendant to any election, (T-653-4, 597), were the causes of complaint throught the City and were in no way attributable to or related to racial discrimination, but merely the result of human fallibility and are expected to occur in an election involving 5,000 election districts.

The opinion states that at P.S. 61 and P.S. 160, the polls opened 1-1/2 to 2 hours late and those polling places served predominantly minority voters (A-170). Plaintiff's own exhibit (A-248 Ex. 2-3), indicates that P.S. 61 and P.S. 160 and 40-60% minority voters and that, thus, these polling sites had 50% white and 50% minority voters. On its face, this could not have had a racial impact since presumably as many white voters as minority voters were involved.

Emanuel Church, at which admittedly the voting materials arrived late, was the polling place for a single election district (A-244). Appellees own witness testified that 102 votes was the total cast in that election district (T-333) and that only 25 voters arrived at the polling place before the materials (T-330); another witness testified that some of these voters returned later (T-512).

While it is true that the parent voter buff cards never arrived at J.H.S. 71 and that there were 83 registered parent voters at this school (A-228), the assumption by the District Court that 83 voters were thus denied the right to vote is unrealistic and fallacious under the appellees own statistics (A-228) which show that the largest percentage of parent voters who voted in any election district was 64.7% of the registered parent voters and that in some election districts only 35% to 40% of the registered parent voters voted. Not one registered parent voter who was registered to vote in J.H.S. 71 appeared at the trial to testify that he was denied the right to vote. It is curious that no complaint about the missing buff cards was brought to the attention of the election authorities during the election , especially in view of the fact that District Superintendant's office was located in that school.

B. Unfair and inconsistent treatment of parent voters (A-171-2)

The District Court found that there was confusion as to where parent voters were to vote, that they did not attend their correct polling places, and several voted for District 2 candidates at the sites where both districts voted togehter. This the Court concluded deprived minority parent voters of an effective vote. This conclusion was reached without a showing that these incidents were unusual or unique to district one.

The alleged deprivation of the right of minority voters to vote by reason of the above facts is miniscule or non-existent

since once again appellees own evidence (A-228) shows that the minority parent voters in District 1 who were registered, voted at an average of better than 50%, more than twice the 22.45% average of eligible regularly registered voters who voted in District 1. (A-228).

As to the District Court's comment about J.H.S. 22 and J.H.S. 56 (172; note 22), which were not polling sites, thus, resulting in a lower vote in these schools, it is clear that this statement is without merit, since it does not take into consideration the facts that J.H.S. 60 and P.S. 188 which were polling sites, had approximately the same percentage of parent voters who voted (A-228).

c. Inconsistent policy on identification and other irregularities caused by the use of computer printouts (A-172-5).

Because of the use of buff cards for parent voters and computer printouts for regularly registered voters, in some election districts identification was required by some inspectors since voters could not be identified by signature. Some election district inspectors did not require identification. The District Court found that where such identification wasrequired, it was required of all voters, regardless of race (A-172). Certainly this could not be deemed an area of racial discrimination. But, says the District Court, alleged discrimination on this ground resulted because identification was required principally in those election districts which had predominately minority voters, citing

P.S. 34, P.S. 61, P.S. 160 and Emanuel Church. Again we must point out that P.S. 61 and P.S. 160 were 50% white and 50% minority (A-248, Ex. 2,3).

An examination of the inspectors' ethnic backgrounds shows that those demanding identification at P.S. 34 were black, an Hispanic and a white inspector (T-537). At P.S. 160 six inpectors were involved, four were Hispanic and two were white (T-519); at Emanuel Church there were two inspectors, one Hispanic and the other black (T-516). No testimony was elicited as to the ethnic background of the inspectors at P.S. 61. To hold, in view of the ethnic background of theseinspectors, that their requirement for identification was racially discriminatory constitutes a non sequitor, unless the Court is prepared to find that blacks and Hispanics have discriminated against other blacks and Hispanics.

The irregularities found by the District Court concerning missing names, unalphabetized buff cards, misspelled names are simply clerical errors which would be applicable to white voters as well. The District Court admits that this did not affect the voting rights of a substantial number of minority voters (A-175).

D. Inadequately instructed inspectors and interpreters (A175-78)

With respect to the interpreters, the Board of Elec-

tions under the provisions of the Lopez order was directed to furnish same and the Board complied with that direction. These interpreters were actually furnished by the District Superintendent, whom the appellees support and who was a supporter of appellees candidates for school board membership (T-645). Accordingly the appellees should not be heard to complain of the alleged shortcomings of the interpreters furnished by them to the Board of Elections.

The District Court in it's opinion refers to certain orders it made in September, 1973, concerning bi-lingual assistance in the November 6, 1973 elections and for future elections (A-157-8). Such reference is completely irrelevant to the instant action since such orders were not in existence at the time of the May 1, 1973 election.

Further, it was to some extent, the refusal of the District Court when making the Lopez order to grant the request of appellants counsel to define the term "assistance" (A-156) and to provide specifically that the laws of the State of New York were to apply to interpreters except as otherwise provided in the said Order that gave rise to some of the problems with the interpreters.

The District Court criticized the Board of Elections for hiring inspectors in the same manner as in other elections, although these were the only people with previous election ex-

perience and many of those hired were of minority ethnic background. The District Court gratuitously refers to a manual that speaks of a literacy test requirement (A-177), even though it is completely irrelevant to any issue herein since there is no evidence that a literacy test was demanded of any voter who presented himself to vote, or that any voter was denied the right to to vote on this ground. No evidence was presented that the Board of Elections issued this manual for use in the School Board election or that it authorized or sanctioned its use for this election.

E. Changes in election districts and polling sites in minority districts had a discriminatory impact (A-178)

Appellees witness testified that all the regular polling sites used in previous elections, except for a new polling site at Emanuel Church, for one election district, were used in the May 1, 1973 election. From this, the District Court concludes that the use of regular polling sites was an irregularity.

The District Court states that the " defendants gave no explanation for these changes; and have never explained why they occurred almost exclusively outside of white areas," thus placing an unwarranted burden on the appellants when in fact it was the burden of the appellees to establish that such changes had a racially discriminatory purpose. Many of the changes referred to by the appelles were minute changes between election districts which were of no consequance, yet, all changes were grouped together

to create the impression that a large number of voters were affected. No proof as to the number of voters affected by these changes was presented (A-248, Ex. 1,2,3).

Since the " one man one vote " rule was enunciated by the Supreme Court in Baker v. Carr 369 U.S. 186, changes in election districts by reason of population shifts are mandated. Local Law 4 of 1973, effective January 18, 1973 was adopted by the New York City Council resulting in a City-wide redistricting.

In Perkins v. Matthews, 336 F. Supp 6 and Gray v. Main 300 F. Supp 207, 215 (Ala. 1968) those courts held that the changing of polling sites was not intended to and did not in fact have a racially discriminatory effect. See also Gibson v. Kugler 315 F. Supp. 1003 (N.J. 1970), where voter registration requirements were held not to be discriminatory.

The District Court found that as a result of the placement of polling sites in middle-income housing projects which were predominantly white occupied, the percentage of white voters (54.9%) was much higher and that, therefore, this was a cause of racial discrimination (A-181). The Court failed to recognize that these polling sites were not so placed for the May 1, 1973 election but were in existence and had been so used for many years. Further, many of these buildings have sufficient registered voters to constitute a single, complete election district (A-242, E.D.4, E.D.5, E.D.6, E.D.7). To find and hold that the use of

a regularly constituted polling place is an irregularity and discriminatory would appear to be illogical.

Appellees expert witness testified that a survey of elections held in 1972 showed that whereas 33% of eligible Puerto Ricans voted, less than 50% of blacks voted, that 65% of whites voted (T-41). The vote of 54.9% of white voters in the middle income buildings (A-181) was less than the normal percentage of white voters testified to by appelles' expert.

When the District Court found that no polling sites were located in buildings housing predominantly Puerto Ricans or blacks (A-181), it did not consider the fact that polling sites were located at 294 Delancey Street and 77 Columbia Street which had respectively 60-100% and 40-60% black and Puerto Rican population (A-144)

F. Intentional discrimination against minority voter (A-181)

The District Court found no evidence that the Board of Elections of the Board of Education intentionally discriminated against minority voters in the May 1, 1973 election (A-181); that any alleged incidents of intentional discrimination were done pursuant to instructions from the chief administrators of the school board elections (A-182); and that any such incidents caused a denial of voting rights to a large number of voters (A-182).

In fact, a few isolated instances of alleged discrimination by election inspectors were as hereinbefore stated the acts of minority inspectors. If, as the District Court implies, all these acts were due to the lack of training of inspectors, such untrained inspectors were present not only in minority polling places bu throughout the city (A-675). The same type of inspector was at every polling place, and there is no evidence whatsoever that only at minority polling places in District 1 were untrained inspectors assigned.

The District Court, while recognizing that there were two slates of candidates (A-166) attributed all of the confusion and irregularities such as interference with inspectors and voters to the appellants and their supporters. The record is replete with testimony that a great number of incidents are attributable to the appellees and their supporters i.e.(A-504,505, 521, 562, 563, 600, 602).

The election of May 1, 1973 was an open and free election with the usual complaints and occasional irregularities which normall occur in any election. This Court in Powell v. Power, 436 F. 2d 84 (2d Cir. 1970) stated:

> "*** we cannot believe that the framers of our Constitution were so hypersensitive to ordinary human frailities as to lay down an unrealistic requirement that elections be free of any error."

As to the Toney requirement that the complaining party must show that the outcome of the election could have been affected, the District Court found:

> "Thus while the difference between candidates who finished ninth and tenth in the balloting after all of the redistribution, was 266, it is impossible to know the significance of this figure. It is quite possible that a change in the out come of the election would have resulted if, after the first count, an additional or different one or two candidates had reached quota, and thus had their surplus ballots redistributed to the second preference indicated. On this theory, somewhere between 108 and 143 changed or additional ballots could very well have changed the outcome. It is most likely that the exact figure which indicates the number of changed or amended ballots necessary to change the outcome lies somewhere between 108 and 266. All this Court can do at this time, in determining whetehер the outcome of the election could possibly have been affected by discrimination, is to indicate the order of the magnitude with which we are concerned" (A-162)
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> **********
>
> " In totality, the conduct which had a racially discriminatory impact affected several hundred votes, which could ahve altered the outcome of the election." (A-169)

In respect to the outcome of the election, it must be noted that the appellees at the trial herein took the position that it was unnecessary for them to show that because of the alleged discrimination a different result would have occurred in the election (T-17), and appellees case was presented to the trial Court upon this theory. Appellants were justified in relying upon such expressed theory of appellees' case and were not therefore obligated to and did not adduce any evidence on the trial with respect to the effect of the irregularities charged upon the outcome

of the election.

The District Court's conclusion that several hundred voters were denied the right to vote is not sustained by the evidence. The only credible evidence of voters being denied the right to vote is the finding that at J.H.S. 71 where the parent buff cards were never delivered there were 83registered parent voters (A-234, Ex. p 25a). Assuming that the highest percentage of parent voters in any school in the district would have voted at J.H.S. 71, 64.7% would have voted at this school (A-234, Ex. p 25a) and thus 54 parent voters may have been denied the right to vote at J.H.S. 71. This assumes that all would have cast a valid ballot and that, in fact, none obtained a court order and actually voted in the election.

At Emanuel Church, 25 voters could not vote because the election materials did not arrive until 12:30 P.M. (A-330). On the assumption that none of these voters returned to vote after the materials arrived, another 25 voters could not vote.

Appellees produced approximately 15 witnesses who were regularly registered or registered as parent voters to testify. Some were shown not to have been registered, some appeared at the wrong polling places, some obtained court orders and voted and some in fact, voted. Only one voter was actually shown to have been denied the right to vote and in this instance it was because her name was mispelled.

The credible evidence does not support a finding of "several hundred" being denied the right to vote, the meaning of the word "several" being illusory and ininterpretable, and the word "hundred" being singular.

Nine (9) candidates were elected; the tenth candidate, Beck, lacked 266 votes for election after the 11th count of the ballots under the proportional representation method of redistributing and counting ballots (A-162). The District Court assumed that if "several hundred additional votes had been cast candidate Beck may have been elected, 1260 votes being the required number for election.

The error of the District Court's conclusion as to the possibility of Beck's election is manifest when it is seen, 1) Beck received 563 votes on the first ballot; 2) then there were 11 rounds of counts and the redistribution of 4645 ballots; 3) from such redistribution Beck received an additional 431 votes, giving him then a total of 994 votes (A-236). In a proportional representation election, on the above analysis and mathematical computation, it would appear as an impossibility for candidate Beck to receive 266 votes out of "several hundred that would have been cast.

The fallacy of the theory that somewhere between 108 and 143 changed or additional votes could have changed the outcome lies in the assumption that if 108 votes were cast for L. Brown or 143 for Hoggard these candidates would have excess

ballots to distribute (A-163). It is axiomatic that in a proportional representation election that if a candidate fails to reach quota on the first count of the ballots he cannot have excess ballots to distribute since all the ballots cast for him as first choice would be credited to him and thereby exhausted. L. Brown was declared elected at the 8th round count (A-236) after the redistribution of an additional approximately 1,500 ballots after the initial first count. Hoggard required the redistribution of approximately 2,500 ballots to reach quota at the 10th roud count (A-236).

Assuming that L. Brown had received all of the additional "several hundred" votes as first choice ballots and Beck was declared second choice on each such Brown ballot, after reaching quota by exhausting 108 ballots the surplus would be distributed to Beck as second choice, Beck would still be 371 votes short of quota. Of course these assumptions are made without consideration of the reality that some of the additional votes which would be cast would be void or become exhausted, that the quota would be increased by some 30 votes and that in no instance upon the redistribution of the ballots had any candidate received any where near 100% of the excess ballots of a candidate as a later choice.

An additional"severalhundred" votes could not have changed the outcome of the election.

It would appear that if in fact the outcome of the election was affected, that only candidate Beck and the last two candidates who were declared elected on the 12th round of counting as a result of the re-distribution of Beck's ballots should be involved in any special or run off election for the two remaining seats, and that the entire election should not have been voided with nine seats to be filled.

It is respectfully submitted, that the record herein shows that the appellees as complaining parties have failed in every respect to establish by the credible evidence that the election herein was tainted to any meaningful extent and the District Court erred in voiding said election.

POINT III

THE ADDITIONAL RELIEF GRANTED BY THE DISTRICT COURT AFTER VOIDING THE ELECTION WAS EXCESSIVE, EXTRAORDINARY AND IMPROPER.

After voiding the election, the District Court declared the offices of those elected as school board members in the May 1, 1973 election vacant, removed the said elected public officials from their offices and ordered the Chancellor of the New York City Board of Education to discharge the statutory and adminstrative powers of the removed school board pending the special election of a new school board. (A-193)

At no time were any charges made by the complaining parties that any of the elected members of the school board had personally engaged in any racially discriminatory practice or were guilty of any other irregularity in the conduct of the election. The voiding of the election by the District Court was based only upon charges made against the Board of Elections and the Board of Education in the conduct of the election. Yet, upon ordering the removal of the elected school board, the District Court entrusted the discharge of that board's functions in the interim to the very Board of Education whose actions and activities it condemned and found to be the cause for the voiding of the election.

In a review of the cases where elections have been voided, and in other cases where elected public officials have been found to be unlawfully continuing to hold office, the courts have permitted those public officers to continue to discharge their official duties, while declaring the offices vacant for the

purpose of electing a successor, and until such successor has been elected and qualified.

Hamer v Campbell, supra, the election was voided, a new election was ordered andwith the complaining party's concession and the court's approval, the elected officials in the voided election were allowed to remain in office until new elections were held (p.224, note 26).

Toney v White, supra, an election was voided and a special election was ordered by the District Court. The Fifth Circuit on December 3, 1973 modified the District Court order by eliminating therefrom the direction to hold a special election and permitted the 1974 regular elections (the termof office involved expired in July, 1974) to be substituted for the special election ordered below.

Smith v Paris, supra, the District Court found racial discrimination in an election and refused to set aside the election because the complaining party had known of the discrimination for 6 or 7 weeks prior to the election, but waited until the election was in progress before seeking judicial relief. The term of office of the elected officials was for four years ending in 1970. On appeal, the Fifth Circuit modified the District Court order to restrict the term of office involved to 2 years rather than 4 years by requiring new elections at the next regular elections to be held in 1968. The Fifth Circuit decision was rendered in 1967.

Roher v Dinkins, supra, was a case decided by the New York State Court of Appeals and one in which the right of five (5) members of the previous school board in District 1

(who were incidentally supported by appellees) who had been appointed to fill vacancies was challenged. Those five (5) members contended that they had been appointed to fill the full unexpired terms of the departed elected members as provided in the New York State Education Law (Education Law, 2590-c 6 (34) b) and therefore their respective terms of office expired on June 30, 1973. The challengers contended that the appointed members terms of office ended December 31, 1972 and duly filed petitions as candidates for those offices for the election to be held in November, 1972. The Board of Elections refused to honoe those petitions or to schedule and conduct the election for those offices in November, 1972.

The New York State Court of Appeals held that the section of the Education Law permitting vacancies to be filled by appointment for the entire unexpired term of a previously elected board member was in violation of the State Constitution; that the terms of the appointed, challenged members expired on December 31, 1972 and should properly have been filled at an election in November, 1972; that the offices of the appointed members of the school board were vacant, but that they could continue to serve until their successors had been chosen and qualified; and that since a new election for school board members aws to be held in May, 1973 (the election under review in this case), the court would not order a special election.
See also: N.Y. State Public Officers Law Sec. 5

Bearing in mind that Roher involved the instant District 1 Board where school board members whose offices were declared vacant were permitted to continue in office and serve even though such offices were being held in violation of the

State Constitution, it is difficult to reconcile the District Court's decision removing innocent school board members after declaring their offices vacant. The voiding of the election was not based upon such magnitude of error that the election did not reflect the will of the majority of the electorate and the District Court should not have so readily subverted the fundamental right of the people to choose their representatives.

The next general elections in New York City will be held in November, 1974. The authorities hereinbefore cited support the position that even if the court affirms the voiding of the election, the proper ensuing remedy would be to re-instate the board members under a declaration that their offices are vacant until their successors have been elected at the next general election in November, 1972 but that they are to serve and discharge their duties as school board members in the interim.

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED IN ALL RESPECTS AND THE COMPLAINT HEREIN BE DISMISSED.

Respectfully submitted,

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I certify that I served a true copy of the within bond upon Frederick C. Sherman by leaving same at his office 375 Park Av. N.Y.C. on the 19th day of March 1974

Joseph Forest